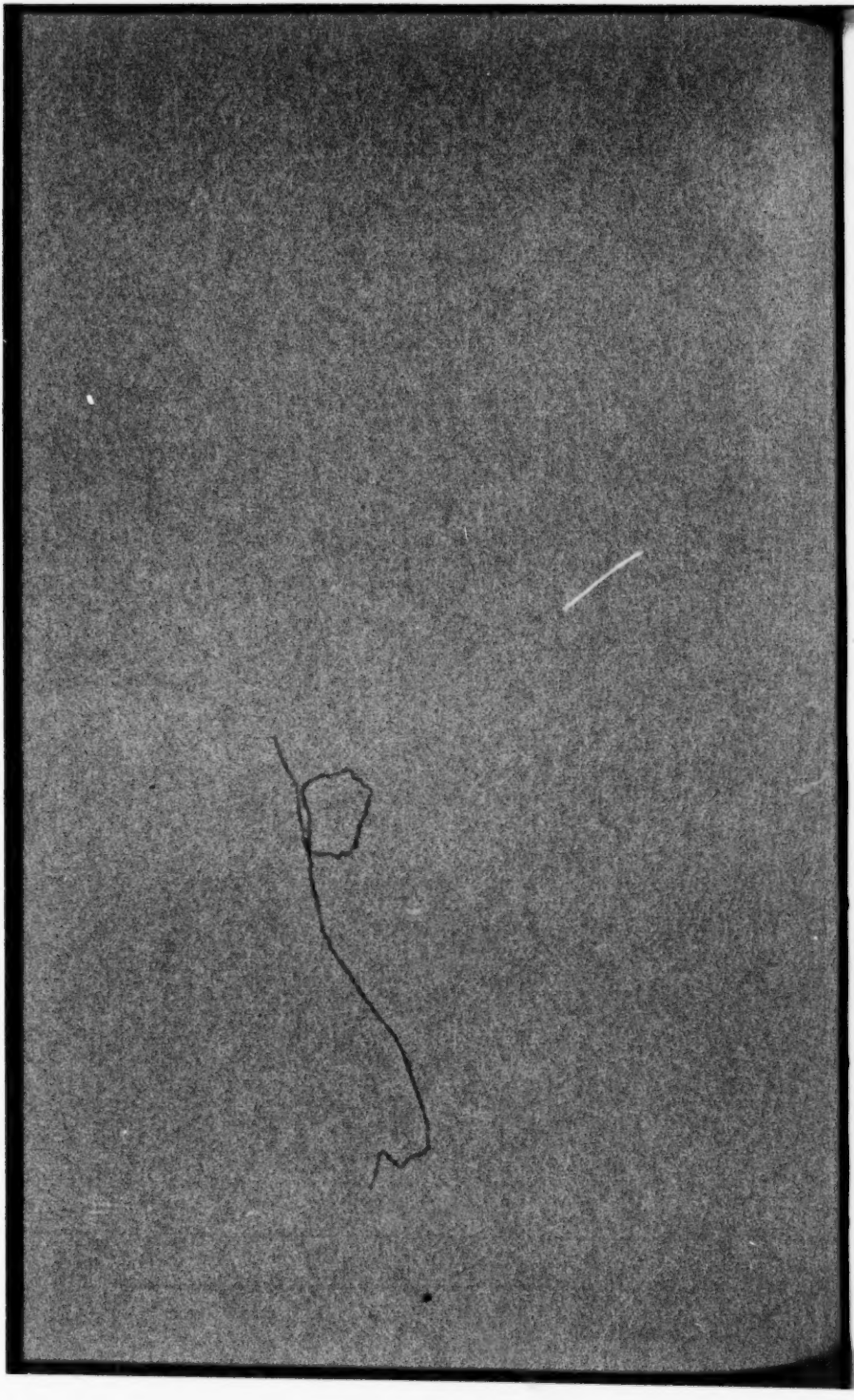

INDEX.

Subject Index.

Cases Cited.

Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 485.

GUY WHITEFORD, *Petitioner*,

v.

THE HECHT COMPANY, a corporation, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

The petitioner, in his statement of the case, has emphasized certain disputed questions of fact (*e. g.*, pp. 4, 6), thus endeavoring to give color to his contention (p. 14) that the Court of Appeals weighed the evidence and reversed the judgment of the District Court because it disagreed with the conclusion reached by the jury. This is not the case. The judgment of the Court of Appeals is correct upon the basis of resolving all disputed evidence in favor of petitioner, as will be seen by the following statement of facts,

in which we have assumed, in all cases of disputes, that the testimony given by or on behalf of petitioner was true.

The unsuccessful activities of petitioner.

Respondent, the operator of a department store, owned a warehouse in the District of Columbia known as 613-621 G Street, Northwest (R. 10, 11). On February 10, 1936, George M. Quirk, respondent's assistant secretary and store manager, in a letter to petitioner, requested him to "prepare plans for the disposing of the G Street warehouse," which, he stated, respondent would vacate around October 1 [1936], (R. 88, 10).

Between February 15 and February 17, petitioner, in response to that letter, went to Quirk's office in respondent's store. While he was there, Quirk told him that respondent would have no use for the G Street warehouse upon the completion of a new warehouse, then in contemplation, and that it preferred to sell the G Street warehouse. Petitioner told Quirk that his "best bet" was to lease the building, and that he thought the building should be leased to the United States Government, but Quirk said that he did not like the Government as a tenant because the Government made short-term leases and leases for longer periods were contingent upon the appropriation of money to pay the rent (R. 12-13).

Petitioner told Quirk that he would interest himself in the property. Quirk told petitioner to quote $450,000 as the sale price of the property. Petitioner then asked him, "How about the rental?" and Quirk replied that respondent would want a rental of $50,000 (R. 13-14). Immediately upon the conclusion of the conference petitioner went to the office of Clay J. Guthridge, Chief of the Division of Space Control, a division of the National Park Service, which, in turn, was a part of the Department of the Interior (R. 14-15, 125). This Division had control of the assignment of space for the use of the Federal Government, under the provisions of 40 U. S. C., Sec. 289. It was the prac-

tice of the owners of real estate or real-estate agents who had property to list, to communicate that fact to Guthridge or someone on his staff. If Guthridge or a member of his staff considered the matter worthy of pursuing further at that time, he would ask for the submission of a proposal; if it was a building for which the Government had no immediate need, or if it did not appear that negotiations could be concluded, he would ask that the building be listed with the Division and it was put on file and a record was made of that building having been listed with the Division (R. 126, 85).

Petitioner told Guthridge on the occasion of this visit to him that the warehouse would be vacated around October 1, [1936] (R. 14-15). Guthridge did not want the plans of the building because of its unavailability for six or seven months (R. 51, 53-54). Petitioner did not give Guthridge any details in regard to the building. He had not himself been in the building since 1921 (R. 68-69). He did not know the area or the amount of rentable space that it contained, nor did he know the assessed value of the property (R. 48-50, 54). The assessed value was a material factor in the fixing of rentals, as hereinafter more fully appears (*infra*, pp. 4-5). The question of the amount of rental was not discussed at all at the conference between petitioner and Guthridge, and the record does not indicate that petitioner did more than mention the building and advise Guthridge that it would not be available before October 1.

Petitioner had no records in his file which supported his statement that he had had this conference with Guthridge (R. 62). Guthridge testified that petitioner had been in to talk to him about the property, but he was unable to say when that was (R. 131). No record of any listing of the property by petitioner was ever made in the Division of Space Control (R. 128, 151).

Petitioner had no further dealings with any representative of the United States in respect of this property until about the middle of April, 1936, at which time, by appoint-

ment, he met Ralph E. McAllister, an employee of the Division of Space Control, at Eighteenth and G Streets (R. 17, 71). McAllister was assistant to Guthridge and it was his duty to find out about individual buildings (R. 75-76). On the occasion referred to, petitioner showed McAllister a building near Eighteenth and H Streets, and then a building at Seventh Street and New York Avenue. McAllister did not think either of these buildings met the Government's requirements (R. 17-18, 71). They then went to respondent's warehouse. They entered the first floor, but they saw only part of that floor, and none of the upper floors (R. 18, 71). As the building was not to be available until October 1, their examination was "just casual," and they left that building and went to another building on Fourteenth Street (R. 71-72). McAllister was unable to state whether he ever made an oral report to anyone in the Division of Space Control as to his visit to the warehouse (R. 76). He was sure that he had never made any official report thereof in writing (R. 77-78). It was no part of McAllister's duties to conduct negotiations in regard to leases (R. 75-76).

A few days prior to August 28, 1936, petitioner erected a sign on the building and about September 1, one Carl Rosinski, a real estate broker specializing in the leasing of business property (R. 79), telephoned petitioner, said he had seen his sign, inquired as to the rental being asked for the property and asked petitioner whether he would cooperate with him if the latter could secure a tenant(R. 20). Pursuant to permission obtained by petitioner from Quirk, petitioner called Rosinski in to assist him (R. 20).

On or about September 21, 1936, in the course of a conference between petitioner and Quirk at the latter's office, petitioner told Quirk that he had been informed by Rosinski that the Social Security Board had indicated that it would pay 38,000 plus dollars for the property as annual rental, that being as much as the Government would be allowed to pay for the property "under the law" (R. 22).

The law referred to was 40 U. S. C., Sec. 40(a), which prohibited the payment of rentals by the Federal Government of more than 15 percentum of the fair market value of the premises, or more than 25 percentum of the amount of rent for the first year of the rental term, for alterations, improvements and repairs of the rented premises. Rentals in the District of Columbia were subject to a ruling of the Comptroller General that the value fixed by the Assessor of the District of Columbia for taxation must be held to be the fair market value within the meaning of this statute (16 Comp. Gen. 967). The assessed value of the property was $256,346 (R. 52).

Quirk told petitioner that he wanted $50,000 a year rental and that was final (R. 22-23).

Thereafter, under date September 24 (R. 21) Rosinski addressed a letter to petitioner in which he stated that he had discussed the proposed leasing of the building at great length, with the following results: that the United States could not pay more than approximately $38,000 per year; that the Government could spend an amount not exceeding 25 per cent of the yearly rental, or $9,500, on alterations, and that in addition the Government could pay a further rental of 15 per cent of the cost of all alterations made by the owner of the property (R. 23-24).

Rosinski further stated in this letter that in order to make the building suitable for the needs of the Government in would be necessary for certain alterations and improvements detailed in the letter, to be made thereto (R. 23-24). These alterations and improvements would have cost approximately $137,300 (R. 124-125).

Petitioner took the letter to Quirk's office and discussed it with him. Quirk stated that they would not accept a rental of $38,000 plus (R. 24-25).

A few days thereafter, at the suggestion of Rosinski, who desired to submit the matter to Quirk from his, Rosinski's "angle", petitioner and Rosinski called on Quirk and endeavored to pursuade Quirk to make a lease to the

Government on the terms suggested. Quirk, however, insisted that he would not lease the property for less than $50,000, and the conference ended on that note (R. 25-26, 80-81). Furthermore, the requirements of the Social Security Board would not have been met by the warehouse, because the area thereof was insufficient (R. 82), and because the Society Security Board required possession by October 1 and it was apparent at the time of the conference, which took place in September, that possession could not be given by that date (R. 95-96).

On November 18, 1936, Rosinski wrote to Quirk that he had had a call that day from the Social Security Office in regard to the warehouse and that, while the bureau had taken space in Baltimore, there was the possibility that they could also use the warehouse, and Rosinski inquired whether Quirk was willing to deal as previously suggested (R. 26-27). Under date November 28, Quirk wrote to Rosinski that respondent would not be interested in leasing the warehouse in accordance with Rosinski's previous suggestion (R. 27).

Nothing further was done by petitioner or Rosinski so far as the United States as a tenant was concerned.

The lease of the warehouse to the United States for use of Government Printing Office.

Petitioner did not have an exclusive agency in respect of this property (R. 91, 97).

In April or May of 1936, Henry K. Jawish, another broker (R. 52), had brought the warehouse to the attention of Melvin C. Russell, who was the chief of the District of Columbia space control section of the Division of Space Control (R. 149-150), and later, on July 16, 1936, Jawish made a written listing of the property in the office of the Division of Space Control (R. 150, 52-53, 128-129). The Jawish listing was the earliest listing with any Government agency. In the fall of 1936, Russell, together with Jawish, inspected the property and the former made a report thereof to Guthridge (R. 151-152).

The property had also been listed with the Division of Space Control by another real estate broker, Frank J. Mulkern, on October 6, 1936 (R. 129-131).

Bedford S. Robertson, another real estate broker, had also submitted it to J. Reed Carpenter, Chief of the Space and Rental Section of the Social Security Board, in August or September of 1936, and it had been inspected on behalf of that Board by reason of such submission (R. 122, 136-137); and Robertson had gone through the building with Reed F. Martin, Chief Clerk of the General Accounting Office, with a view to the United States Government becoming a tenant thereof for the use of that Office (R. 159). Robertson had also submitted the building to the Treasury Department, Soil Conservation and the Government Printing Office (R. 122).

Respondent's new warehouse was completed on February 1, 1937 (R. 96). Respondent itself had been endeavoring to sell the G Street warehouse or to lease it to a private tenant (R. 15, 16, 29, 106-107), but neither a purchaser nor a tenant had been found (R. 97-98). At about that time, and shortly before February 3, 1937, Quirk discussed orally with Guthridge a possible renting of the warehouse to the United States (R. 131). This was followed by a letter from Quirk to Guthridge on February 3, 1937, in which he advised Guthridge that respondent would be ready to vacate the warehouse on February 20, and he requested Guthridge to communicate with him if any of the Federal Departments were interested (R. 27-28).

Quirk knew the procedure in regard to leases to the United States, because respondent had previously leased another property to it (R. 106, 164-165).

At about that time the Government Printing Office was in need of space for storage, and Alfred E. Hanson, Mechanical Superintendent of that Office, went to the Division of Space Control, and there told Guthridge and the latter's assistant, Russell, of his requirements.

Russell mentioned to Guthridge the fact that perhaps the respondent's warehouse would meet the requirements

of the Government Printing Office (R. 152), and a day or two thereafter Guthridge suggested the building to Hanson and told him to get in touch with Quirk in regard thereto (R. 153, 155). Hanson did get in touch with Quirk (R. 156) and after negotiations which lasted two or three months (R. 158) a lease was made to the United States for the use of the Government Printing Office (R. 131). The lease was dated June 1, 1937 and was at a rental of $38,449.92 (R. 5, 39). The term was for the period begun June 1, 1937 and ended June 30, 1938, with renewal options on the part of the United States for further periods not extending beyond June 30, 1941. Respondent agreed to make certain alterations and improvements, for which the United States agreed to reimburse it in an amount not exceeding $8,500 (R. 35). These improvements and alterations were made by respondent at a cost of $10,431.87 (R. 100, 124). This was about $127,000 less than what would have been the cost of the improvements and alterations which the Social Security Board desired (R. 124-125).

The United States remained in possession of the warehouse and paid rent therefor at the stipulated rental for the period from June, 1937 through March, 1940 (R. 3), the action having been filed April 12, 1940 (R. 1).

No submission of this warehouse by either petitioner or Rosinski was in any manner the cause of Hanson's attention being directed to the warehouse, or of the negotiations and lease which ensued. Russell knew of the warehouse because he had inspected it with Jawish (*ante*, p. 6) and not by reason of anything that petitioner or Rosinski had ever done (R. 151) and Guthridge's getting in contact with Quirk was due to the fact that Jawish had listed the property in July, 1936, and not by reason of anything done by petitioner or Rosinski (R. 128).

As to this, Russell testified as follows:

> "Q. And what caused you to know about the G Street building when you directed that to the attention of Mr. Guthridge?

"A. The fact that I had visited the building, was familiar with it, on my visit with Mr. Jawish.

* * * * * * * * * *

"Q. Did the fact that Mr. Whiteford or Mr. Rosinski had ever been in the office have any bearing on your knowing about that building?

"A. No, none whatsoever." (R. 152.)

Guthridge testified on this point as follows:

"Q. Did any listing or any record cause you to call Mr. Quirk?

"A. Yes.

"Q. Will you please tell us whose listing or record caused you to do that?

"A. Mr. Jawish had made a listing back in July.

* * * * * * * * * *

"Q. Did you get in touch with Mr. Quirk to inquire of him as to whether or not the space might be available by reason of anything that Mr. Whiteford or Mr. Rosinski did?

"A. Not to my recollection, no. (R. 128)

II.

REASONS RELIED ON FOR THE DENIAL OF THE WRIT.

1. The case is not one of sufficient importance either to the litigants or to the public to justify the granting of the writ.

2. The case does not involve the construction of any statute or legal principle of general application, and does not involve a real question under the Constitution.

3. The judgment of the United States Court of Appeals for the District of Columbia is plainly right.

III.

SUMMARY OF THE ARGUMENT.

A real estate agent or broker is not entitled to a commission for obtaining a lease unless his activities in connection therewith were the procuring cause of such lease;

and where there is no evidence from which it could reasonably be found that the agent or broker was the procuring cause, there is no issue justifying submission to a jury.

IV.

ARGUMENT.

The general principle as to when a real estate broker is entitled to a commission is well settled in the District of Columbia. As stated by the Court of Appeals of the District of Columbia in *Shoemaker* v. *Digges*, 46 App. D. C. 206, 214, the broker is entitled to a commission if he finds a customer with whom the owner closes the deal and if he is the real procurer thereof.

It is respectfully submitted that on the facts of this case neither petitioner nor Rosinski either found a tenant for the property or was the procurer of the lease.

The presence of various departments and agencies of the Government of the United States in the District of Columbia was of course well known to respondent as well as to all other persons. Equally as well known by reason of its notoriety, was the fact that the United States is and always has been a potential lessee of large properties, particularly during 1936 and 1937, which were periods of great expansion of Governmental activities. As an example, the Social Security Board was at the time, to use the language of one of its officers, "frantic for space" (R. 138). Furthermore, respondent had on a previous occasion leased other property to the United States (R. 108, 164-165). It cannot be successfully contended that any person, real estate broker or otherwise, is entitled to compensation for introducing a property owner to his Government, particularly when the Government is seeking space and maintaining an agency for that purpose.

Coming then to a consideration of the question of whether petitioner or Rosinski stimulated or procured the execution of the lease, we find it summary:

About the middle of February, 1936, petitioner went to the Chief of the Division of Space Control. Apparently he did no more than mention the fact that the property would be available about October 1. Guthridge was not interested in property so remote as to time of availability. There was no discussion between petitioner and Guthridge as to the character of the building, its area, its assessed value or the rental that would be demanded for it or that could be paid for it. No written record of any kind was either submitted by petitioner or made by the Division of Space Control.

In April, 1936, petitioner took to the building Ralph E. McAllister, an employee of the Division of Space Control, whose duty it was to find out about individual buildings, but who had no authority to negotiate in regard to leases. McAllister and petitioner went to the warehouse, and made a casual inspection, viewing a part of the first floor and the outside of the building. McAllister did not care to make other than a casual inspection, because the building would not be available before October, and no record of his visit to the building was made in the office of the Division of Space Control. This was the end of petitioner's activities so far as the United States was concerned.

The activities of Rosinski in September, 1936, in connection with the Social Security Board may be entirely disregarded. In fact, a lease to that agency was no more than an idea of Rosinski's. The Social Security Board wanted space larger than respondent's warehouse, at a time when respondent's warehouse could not be delivered to it, and required repairs which would have cost $137,300. Rosinski's activities led nowhere and could have led nowhere, and his energies were devoted principally to endeavoring to persuade Quirk to make such a lease (R. 59-60).

There is no pretense that petitioner or Rosinski were the only persons who had ever discussed the property with representatives of the United States. The property had been listed and exhibited by Jawish, Mulkern and Robert-

son, other real estate brokers, at various times. There was no evidence that the activities of petitioner or Rosinski stimulated the United States to become lessee of the warehouse; the uncontradicted evidence of Guthridge, Russell and Hanson, who handled the matter for the Government, was directly to the contrary (*ante*, pp. 8-9).

The question then is whether an agent is entitled to a commission for doing nothing except casually mentioning the property to one representative of the Government and casually exhibiting it to another, without any discussion of details or terms, when neither representative became interested in the property as a result of such mention or exhibit, made any record thereof, remembered it, or was in any manner influenced thereby. We respectfully and confidently submit that the answer to this question must be in the negative, as otherwise property owners would be subjected to claims by every agent who had at any time mentioned the property to a person who subsequently became a purchaser or lessee.

This case does not present the situation which sometimes occurs when an owner discharges the agent and then concludes a deal with a prospect stimulated to the purchase by the activities of the broker, upon terms no more favorable to the owner than those which could have been obtained by the agent. Neither petitioner nor Rosinski ever brought to respondent an offer from the Government. Although the petitioner, in paragraph 6 of his complaint (R. 2) claimed that he brought respondent a definite offer on the part of the Federal Government to lease the premises for occupancy by the Social Security Board, the testimony did not develop any such offer, but merely a statement by Rosinski that he thought he could interest the Social Security Board in the property.

When petitioner mentioned the warehouse to Guthridge in February, 1936, he knew that Quirk wanted a rental of $50,000 per year (R. 13-14) and also knew or should have known that the United States under the statute (40 U. S. C.

Sec. 40-a) as construed by the Comptroller General, could not pay more than a little over $38,000 per year. His attention of the property to Guthridge was necessarily barren of results, and could have been made for no other purpose than to establish a claim to commission in the event the property should ultimately be leased to the United States. The same is true of petitioner's visit to the property with McAllister in April, 1936. So far as Rosinski's activities are concerned, there were the additional factors that the Social Security Board wanted an office building, whereas respondent's building was a warehouse which had formerly been a garage, and which would have required an expenditure by respondent of $137,300 in order to make it suitable for the needs of the Board; that its area was insufficient for the needs of the Board; and that the premises could not be delivered within the time within which the Board needed space. Petitioner's whole case, therefore, rests on his casual talk with Guthridge in February of 1936 and his casual inspection of the property with McAllister in April, 1936. For this he claims to be entitled to $1,922.50.* for each year that the United States occupies the warehouse under the 1937 lease and all renewals thereof and, presumably, 5 per cent of such rentals as may hereafter be paid by the United States under any future lease thereof.

The complaint (Par. 8, R. 2) is predicated upon the charge that petitioner had entered into an agreement with the respondent, and that while, pursuant to that agreement, he was urging respondent to accept an alleged offer on the part of the Federal Government to rent the premises, respondent went behind petitioner's back and consummated a rental agreement. During the trial, the Court permitted an amendment to the complaint, that amendment being limited to a shift from an action on special agreement to an action on implied promise to pay.

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* 5% of $38,499.92.

The Court held and charged the jury that the evidence offered by petitioner did not support his claim as outlined above, and stated *inter alia*:

> "The evidence does not permit the petitioner to claim that he submitted an offer in the letter of Mr. Rosinski of September 24, 1936, and that this was rejected by the respondent, and that later the respondent went behind his back and consummated an agreement of the character suggested in Mr. Rosinski's letter, for the reason, among others, that the lease entered into on June 1st of the following year, while identical as to rental, was entirely different as to conditions in respect of changes in the building. But this evidence was received as a part of the showing of efforts on the part of the petitioner and as bearing on the principal point as to whether he was the procuring cause and whether or not there was any abandonment of his efforts as of September, 1936; and you will consider the evidence for those purposes." (R. 169.)

This conclusion reached by the trial Court points quite clearly to the correctness of our contention that the case should not have been submitted to the jury but that respondent was entitled to a directed verdict.

Petitioner cannot under any circumstances claim that he was an exclusive agent with reference to the handling of this property. Admittedly, petitioner made no written or official listing of the property in the Division of Space Control. On September 21, 1936, the basis upon which Rosinski thought the Social Security Board might become interested in the property was placed before respondent's representative, Quirk, who stated definitely he was not interested in it. Again, admittedly, Jawish the real-estate broker formally, and on an official form provided for that purpose, had listed the property with the Government in July, 1936 and in August or September, 1936, Robertson, also a real estate broker, did likewise, both brokers having it viewed by Government agents. Thus it cannot be denied that there was more than one real estate broker attempting to make some deal with reference to this property.

In the case of *Evans* v. *Shinn,* 400 App. D. C., 557, 562, the Court said:

> "Petitioner was not the exclusive agent. He was operating in competition with other agents on equal footing with himself. * * * The rule as to procuring cause is different where there are many agents, and where there is a single agent. * * * Where there are a number of agents, however, the purchaser may be negotiating with different authorized agents of the owner, and, if so, the agent is entitled to the commission who first brings to the owner a contract satisfactory to him, and which the owner accepts, provided there has been no collusion between the agent and the owner to defeat another agent who has been negotiating with the purchaser."

Cited and approved in:

Cissel, Talbot, & Co. v. *Hayden,* 41 App. D. C. 477, 479;
Taylor v. *Maddux, Marshall & Co.,* 55 App. D. C. 254, 4 F. (2d) 447;
Goldsmith v. *Buckey,* 62 App. D. C. 61, 64 F. (2d) 559.

See also *Rosenfield* v. *Wall,* 94 Conn. 418, 109 Atl. 409.

As we pointed out before, and with earnestness we again contend, according to the record, Guthridge on behalf of the Government approached respondent because of the fact that Jawish and not petitioner had listed the property in July, 1936, and the property was ultimately leased not by reason of anything done by petitioner or Rosinski. We contend that as a matter of law it must be held that neither petitioner nor Rosinski was the procuring cause of the leasehold engagement.

In *Battle* v. *Price,* 63 App. D. C. 326, 72 F. (2d) 377, a broker had called certain property to the attention of a person who subsequently bought it. At the time of his so doing the owner was not in a position to sell and the prospective purchaser was not in a position to buy. Subsequently, and without the aid of the broker, the property was sold to the prospective purchaser. The broker sued for

commission. In affirming judgment for the respondent the court said (p. 327):

> "To become entitled to a commission, a broker must find a purchaser who is able and willing to buy on the identical terms offered by the seller. (Citing cases) This the petitioner did not do. At no time before he ceased to participate in the trade was Miss Lee (the purchaser) able to go through with the transaction, because it was necessary for her own house to be sold to put her in funds. Nor is there sufficient evidence that Dr. Price (the seller) had named the figure at which he was willing to sell and that Miss Lee had agreed to it. . . . It is true that the petitioner first introduced the eventual purchaser to the respondent, but this circumstance alone, though significant, is not determinative, in the present circumstances."

To the same effect is *Wardman* v. *Washington Loan and Trust Company*, 67 App. D. C. 184, 186, 90 F. (2d) 429.

It is to be borne in mind that petitioner is not claiming compensation for advising or "hounding" respondent, nor on the basis of the amount of his labor. He seeks compensation for a result which he claims to have accomplished, namely, the procuring of the lease (R. 44, 86-87).

The Court of Appeals in its opinion said (R. 202):

> "We find no evidence in the record to support a finding that Whiteford was the procuring cause of the lease made by the Office of Space Control on behalf of the Government Printing Office."

The statement of the Court of Appeals (R. 203) to the effect that if an inference that petitioner was the procuring cause of the lease ever arose, it was rebutted by the testimony, is fully justified by the portion of the testimony of Russell and Guthridge hereinabove quoted (*ante*, pp. 8-9).

The jury is not at liberty to disregard positive testimony uncontradicted and not inherently improbable.

> *Brown* v. *Petersen*, 25 App. D. C. 359, 363.
> *Walker* v. *Warner*, 31 App. D. C. 76, 87-88.
> *Chesapeake & Ohio Railway Co.* v. *Martin*, 283 U. S. 209, 216-217.

We do not, of course, question the doctrine of the various decisions cited on behalf of the petitioner as to when it is proper to direct a verdict, or to direct the entry of judgmen contrary to the verdict. Our earnest contention in this case is that the decision of the Court of Appeals was in accord with the rule laid down in those cases, and that the evidence in the case, both as to direct testimony and inferences reasonably to be drawn, was so clearly insufficient, that no judgment except for respondent, was legally justifiable.

Petitioner apparently takes the position that any evidence in favor of a plaintiff, however slight and unsubstantial, requires a submission of the case to the jury. That this is not the law in the Federal Courts is consistently established by a long line of cases. Thus, in *Schuylkill and Dauphin Improvement and Railroad Company* v. *Munson*, 14 Wall. 442, 447 (1872), this Court said:

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such character that it would warrant the jury in finding a verdict in favor of that party. (Citing cases) Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to a jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed."

To the same effect is *Pleasants* v. *Fant*, 22 Wall. 116, (1875).

In *Gunning* v. *Cooley,* 281 U. S. 90 (1930), cited by petitioner this Court held (p. 94) that a mere scintilla of evidence is not enough to require the submission of an issue to a jury, and, holding that it is not sufficient merely for the plaintiff to produce *some* evidence, the Court further said (p. 94):

> "Where the evidence upon any issue is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is, the Court should give a peremptory instruction to the jury."

In *Pennsylvania Railroad Company* v. *Chamberlain,* 288 U. S. 333, 343 (1933), this Court said:

> "The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts, and promotes the ends of justice'. (citing cases) The scintilla rule has been definitely and repeatedly rejected, so far as the federal courts are concerned."

Even if, as contended by petitioner, there had been circumstances from which inferences in his favor could have been drawn, they were completely refuted by the testimony of Russell and Guthridge, under the well-settled doctrine that inferences are not permissible in the face of positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the fact actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.

> *Pennsylvania Railroad* v. *Chamberlain,* 288 U. S. 333, 341 (1933).

Petitioner seems to assume that it was obligatory upon respondent to prove affirmatively that petitioner's efforts had no part in the chain of causation which resulted in the lease to the Government Printing Office. No such obligation would arise unless and until petitioner produced substantial evidence in support of his contention. The correctness of the decision of the Court of Appeals rests not only on the denials by the officials of the Space Control staff, but to an even greater extent on petitioner's failure to produce evidence to support his claim that he was the procuring cause of the lease made by the Office of Space Control on behalf of the Government Printing Office (R. 202, 203). Respondent was, therefore, not required to produce the evidence in denial at all, although, as this Court found, it did produce positive evidence to the contrary of the appellee's contention, which was in nowise impaired by the labored attempts of counsel for the petitioner, indirectly, and by means of leading questions, to weaken it (R. 132, 135).

V.

CONCLUSION.

It is, therefore, respectfuliy submitted that the petition for the writ of certiorari should be denied.

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